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IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

(No. 15)

THE ATLANTIC COAST LINE RAILROAD COMPANY,

PLAINTIFF IN ERROR,

versus

THE NORTH CAROLINA CORPORATION COMMISSION,

DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF

ROBERT D. GILMER,

ATTORNEY-GENERAL OF NORTH CAROLINA,

AND

F. A. WOODARD,

COUNSEL FOR THE NORTH CAROLINA CORPORATION COMMISSION,

DEFENDANT IN ERROR.

E. M. UZZELL & CO., PRINTERS, RALEIGH.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1905.

(No. 186)

THE ATLANTIC COAST LINE RAILROAD COMPANY,

PLAINTIFF IN ERROR,

versus

THE NORTH CAROLINA CORPORATION COMMISSION,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

SUPPLEMENTAL BRIEF.

The argument of the counsel for the plaintiff is founded upon a misconception of the order of the Corporation Commission and the facts upon which said order was based.

On page 12 of the plaintiff's brief the counsel, in stating what they conceived to be the question presented in the case, say:

> "Can the State require a railroad company to run a special daily train at a loss for the convenience of a limited number of passengers who wish to make close connection with a particular train on a crossing road, it appearing that it is already running sufficient trains to accommodate the general travel on its lines and has arranged its schedules to best accommodate general travel and connect with all connecting roads, and that its failure to connect with such particular train was due to a change of schedule on the crossing road to

which it was impracticable to conform by any change in the schedule of the train which had made the connection under the original schedule?"

The fundamental error into which the counsel have fallen is that the order of the Corporation Commission required the plaintiff in error to run a special daily train at a loss in order to comply with the judgment of the Commission. The Commission did not require by the terms of its order the Coast Line to run any special train, as by reference to the order of the Commission (see page 3 of former brief) will fully appear.

It is not necessary for the Coast Line to run a special train at a loss to perform the order of the Commission. On the contrary, the order can be effectuated either by the extension of the run of the Springhope train or the Plymouth train. The Corporation Commission so held, and this judgment of the Commission was sustained by the Supreme Court of the State, as will appear by reference to the opinion of the Court.

There is error also in the statement that the connection required to be made is only for a limited number of passengers. The jury answered in the affirmative the following issue: "Is it reasonable and proper that, for the convenience of the *traveling public*, the defendant company should be required to make such connection?"

This connection is a convenience for the general traveling public and not alone for the residents of that section of the State through which the lines of the Coast Line are operated. By reference to the map of North Carolina it will be seen that sixteen counties, containing a population of four hundred thousand, are dependent upon the Selma connection for the means of reaching the capital and other points in the central and western part of the State. Raleigh, the capital, is of course in many respects the most important city of the State. In it are located four female colleges, the State Industrial College for

Boys, and all the State institutions. The business relations between the east, west and central sections of the State are close and important. Thirty miles west of Raleigh is the State University. Twenty-five miles west of Raleigh is Trinity College, the college of the Methodist Church. One hundred miles west of Raleigh is the town of Greensboro, in which is located the female college of the Methodist Church and the Normal College for Girls. All these institutions are largely patronized by the people in the section affected by this connection. It is not true, as stated by said counsel, that the Coast Line has arranged its schedule to best accommodate the general travel and connect with all connecting roads. This was true while it maintained the schedule of train No. 39, with which it made this connection, which, according to the testimony of the general traffic manager of the Coast Line, was the most economical and convenient and the principal outlet for the people of eastern North Carolina to points west of Selma. But, according to the evidence of the general traffic manager of the Coast Line, the Coast Line had practically abandoned this connection, and at the time the order of the Commission was made was running no train with which connection was made with any passenger train of the Southern at Selma. The only train with which any connection with the Southern was made by the Coast Line was with the train which reached Selma at 9:40 P. M. and there connected with a freight train with passenger coach attached, which was scheduled to reach Selma at 10:40 P. M. This train of the Coast Line was operated between Richmond, Va., and Smithfield, a town four miles south of Selma, and was scheduled to leave Richmond at 4 P. M. and afforded no facilities for reaching points west of Selma to the larger proportion of the people from eastern North Carolina.

It is untrue that the failure of the Coast Line to make connection was due to a change of schedule of the Southern, as has been fully demonstrated in a former brief.

Answering the six objections to the order, it is respectfully submitted:

As to the first objection: The order was not the exercise of the police power of the State, in that it was not made to protect the health, morals or safety of the citizens, but was an order requiring the railroad to furnish facilities for the convenience of the traveling public. The power of the State to require facilities for the convenience of the public is as broad and ample as is the police power. "They" (meaning the railroads) "are organized for the public interest and to subserve, primarily, the public good and *convenience.*" Justice Peckham, in *Railroad v. Jacobson,* 179 U. S., p. 296. In *Goodson v. Minnesota,* 166 U. S., p. 430, the Court says: "It" (referring to the State) "may make any other reasonable regulation for their management in order to secure the objects of their incorporation, the safety, good order, *convenience* and *comfort* of passengers and the public."

2. The second objection proceeds upon the same erroneous idea that the order of the Commission required the plaintiff in error to increase the number of its trains. Such was not the effect of the order. It did not require any new train to be operated by the plaintiff, but simply declared that the conveniences of the traveling public which the plaintiff in error had been furnishing for the past ten years should not be lessened at the time when, on account of the increase in business and population, rather an increase in these facilities was required.

3. The objection made in the third place was that the order was not a uniform regulation of the railroads, but a direct inter-

ference in the business of a particular road. This order operated upon the Coast Line and Southern alike. The Coast Line had failed to fulfill the requirement of the statute, which provided that the connecting lines should be required to make as close connection as practicable for the convenience of the traveling public. No suggestion appears here that any other railroads operated in North Carolina were not conforming their schedules to this requirement of the statute. In discussing this objection to the order the counsel still asserts that to obey the order of the Commission the plaintiff in error must operate a new train at a loss. And it is again asserted that the connection was broken by the Southern Railway, when, as heretofore stated by the admission of the general traffic manager of the Coast Line, the connection had been abandoned by the Coast Line before the Southern Railway had made any change in its schedule.

4. The fourth objection is based upon the fundamental error running through the entire argument of the counsel, that the order compelled the railroad to run an additional train at a pecuniary loss. And this is the basis of practically every objection to the validity of the order.

The order of the Commission does not require the Coast Line to operate a new train at a loss, nor is it necessary for the Coast Line to operate a new train in order to obey the order.

The Corporation Commission, after full investigation—the plaintiff in error being represented at the hearing by its counsel and offering testimony—held that in order to carry into effect the order of the Commission it was unnecessary to run a new train at a loss. Upon an appeal by the plaintiff in error from this order the Supreme Court of the State affirmed the

order of the Commission, holding that the order did not require the operating of a new train, but that the connection could be made by the use of the Springhope or Plymouth train without any loss whatever to the company. This judgment was based upon the following admitted facts: The Coast Line operates a train running from Plymouth to Rocky Mount, a distance of seventy miles, scheduled to leave Plymouth at 7:30 A. M. and arrive at Rocky Mount at 10:30 A. M. Returning to Plymouth, this train is scheduled to leave Rocky Mount at 4 P. M. During these five and one-half hours that this train lays over at Rocky Mount the conductor, engineer and other members of the train crew are unemployed. The Commission held that the connection could be made by the use of this train during these five and one-half hours, the distance from Rocky Mount being forty-one miles. The only reason urged by the plaintiff in error why the connection could not be made by the use of this train was: First, that the engine used was an old engine, and with this engine it would not be practicable to make the schedule required to make the connection, which is only thirty miles an hour.

The engineer of the Plymouth train, who was examined upon the trial in the Superior Court as a witness for plaintiff, says (see p. 233 of the record):

> *Q.* "If you had the same size engine used on the Nashville branch you could make the run from Rocky Mount, leaving at 12:55, to Selma by 2:25 P. M., could you not?"
>
> *A.* "Yes, if I had the right of track."
>
> *Q.* "You could make it, including the time consumed for stops?"
>
> *A.* "Yes."

This was the schedule fixed by the order of the Commission for the train to leave Rocky Mount.

Another objection was that the engines used on the branch lines of the company were wood-burners, and coal engines were

used on the main line. It was admitted that a wood-burner engine could be converted into a coal-burner at an expenditure of $300, and that coal was as economical as wood.

The last objection was: That if the connection was made by the use of this train an additional train crew would be necessary, as the run was too long for one crew to make each day. There was, however, evidence in the record, upon the testimony of some of the witnesses of the plaintiff in error, that this run was not too long for a train crew to make daily. But, assuming this contention to be true, and that an additional train crew would be needed to make the connection by the use of this train, the additional cost of making the connection by the use of this train, according to the testimony of the plaintiff's own witnesses, would not exceed $27 per day:

Wages of the train crew (See testimony of W. Moncure, p. 61, record).	$11.60
Fuel (three and one-fifth tons of coal)	9.60
Water	1.00
Oil and waste	1.00
Wear and tear, interest on cost of engine and cars (See testimony of B. R. Lacy, p. 203; D. K. Wright, p. 270 of the record, witnesses examined on behalf of the plaintiff in error).	5.80

Thus we see that if the connection was made by the use of the Plymouth train the cost of operating the train would be $27, thus showing an insignificant loss. That the connection could be made by the use of the Springhope train without loss was clearly established by the testimony. The Coast Line operates a train from Rocky Mount to Springhope, a distance of twenty miles. This train is scheduled to leave Rocky Mount at 9 A. M., returning to Rocky Mount at 12 M.; leaves Rocky Mount at 4 P. M., returning at 7 P. M. The only reason given why it is

not practicable for the connection to be made by the use of this train was that the engine was a wood-burner, whereas it was shown that a wood-burner could be converted into a coal-burner by an expenditure of $300. The other reason given was that during the four hours that this train lay over at Rocky Mount the engineer and conductor were engaged in shifting cars. To make the connection by the use of the Springhope train the only additional expense would be:

Three and one-fifth tons of coal	$9.60
Water	1.00
Oil and waste	1.00
Wear and tear and interest on cars	5.80

As the train crew would be engaged three hours in making the run, we will charge the cost of operating this train with one-third of the wages of the train crew, $11.60, which would be $3.85; total cost, $21.25 per day. The jury having found the probable revenue to be derived by making this connection to be $25 per day, it is thus clearly demonstrated that the connection could be made by the plaintiff by the use of the Springhope train without incurring any loss, but an actual profit would result. This estimate is based upon the testimony of the witnesses examined on behalf of plaintiff in error. The plaintiff in error, therefore, in order to maintain its position that the order compelled the railroad to run an additional train at a pecuniary loss, asks this Court to reverse the finding of the Commission, which was sustained by the Supreme Court, and to adopt the ruling in this respect of the Superior Court Judge whose judgment was reversed by the Supreme Court of the State. The last objections urged by counsel to the order are based upon a misconception of the facts of the case. It is alleged that there is no evidence or finding that the Coast Line does not run sufficient trains to the points of junction with the Southern, or fails to connect with other trains than No. 35 at

Selma. The schedules of the Coast Line and Southern trains operated in North Carolina were introduced in evidence. These schedules show that the Coast Line operates only one train which connects with the Southern at Selma, and this train is scheduled to leave Richmond at 4 P. M., reaching Selma at 9:40 P. M.

The only trains operated by the Coast Line between Rocky Mount and Selma are scheduled as follows:

Leave Rocky Mount at.....	1:30 P. M.
Reach Selma at.....	2:50 P. M.
Leave Rocky Mount at.....	8:10 P. M.
Reach Selma at.....	9:38 P. M.
Leave Rocky Mount at.....	11:10 P. M.
Reach Selma at.....	12:22 A. M.

The trains of the Southern which pass Selma are scheduled as follows:

Reach Selma at.....	8:00 A. M.
Reach Selma at.....	2:25 P. M.
Reach Selma at.....	10:40 P. M.

So it can thus be seen that only one of the trains of the Coast Line connects with any of the trains of the Southern at Selma, and, as before stated, this connection is not with a regular passenger train of the Southern, but is with a mixed train with a slow schedule.

The complaint against the Coast Line was not in the arrangement of its schedule, but was the fact that, according to its own admissions, it had practically abandoned the schedule of the only train with which it made a connection at Selma with a passenger train of the Southern, which connection, according to the testimony of the general manager of the Coast Line, was the principal outlet for passengers from all eastern North Carolina to points west of Selma, and was admittedly a great convenience to the traveling public.

The suggestion that the Southern also broke the morning connection of the train at Goldsboro does not affect the question here. This connection was at once restored. The train with which the morning connection at Goldsboro was made was operated from Rocky Mount to Wilmington and is scheduled to leave Rocky Mount at 5 A. M., and it affords facilities only for people living along the line from Rocky Mount to Goldsboro, a distance of forty miles, and affords no facilities to the passengers of the Coast Line using any of the branch roads of that system. The statement on page 20 of the brief, "The Southern Railroad Company changed its schedule and thus broke a schedule connection which had been maintained by the Coast Line for ten years; naturally, if an extra train were to be run to correct this, the Southern Railroad should be required to run it," is without force.

It has been clearly demonstrated that, while the Coast Line did not change its published schedule, yet, as a fact, it practically broke the connection, according to the admissions of Mr. Borden, its general manager. Surely it cannot be insisted that the Coast Line was maintaining a schedule, when it appeared that from August, 1903, to January 11, 1904, the train of the Coast Line with which this connection was made arrived in Selma on schedule time only on two days, and the average daily delay in this train in arriving at Selma during this period was thirty-four minutes. An examination of the statement on page twenty-three of the record will show that while the average daily delay of this train in arriving at Selma was thirty-four minutes, yet, upon several days during this period, the said train arrived at Selma from one to two hours late. The Coast Line thus, according to its own admissions, having failed to maintain its schedule and thus breaking the connection, and admitting its inability in the future to maintain its schedule and thus make this connection, the Commission was confronted with the question as to the

best method of forcing the two companies to so arrange their schedules as to comply with the requirements of the statute, that "competing lines shall be required to make as close connection as practicable for the convenience of the traveling public." It will be noticed that as long as the Coast Line maintained its printed schedule the connection was always made, and it was only after this schedule of train No. 39 had been practically abandoned by the Coast Line that the Southern asked permission of the Commission to change its schedule, leaving Goldsboro thirty minutes earlier. This request on the part of the Southern was based upon the fact that the schedule of its train between Goldsboro and Greensboro was thirty-eight miles per hour, which they considered dangerous by reason of the condition of the track, and for the further reason that its connection with its through north and south bound trains at Greensboro would be facilitated by this change. The Coast Line admitted that it was impossible for it to maintain its published schedule; therefore, to refuse the request of the Southern to change its leaving time from Goldsboro would not have afforded any relief to the traveling public. Therefore, the Commission made the order simply requiring the Coast Line to deliver its passengers at Selma at 2:25 P. M. instead of 2:50 P. M., requiring the Southern to wait at Selma fifteen minutes if for any reason the Coast Line was late. The practical effect of the order was only permitting the Southern to move up its arriving time at Selma ten minutes. The Southern operates three trains from Goldsboro to Greensboro, as hereinbefore stated. The Coast Line having two trains, the Selma and the Springhope trains, with which this connection could be made, it would have been manifestly unjust to the Southern to have required it to put on a new train to have been operated between Selma and Greensboro and leaving Selma ten minutes after its schedule time for its regular westbound train.